

NLRB Declines to Exercise Jurisdiction Over Student-Athletes' Attempt to Unionize – For Now

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Concluding that its assertion of jurisdiction “would not serve to promote stability in labor relations,” the National Labor Relations Board has declined to exercise authority over the College Athletes Players Association’s (CAPA’s) petition to represent scholarship football players at Northwestern University. *Northwestern University*, 362 NLRB No. 167 (Aug. 17, 2015). Without deciding if the players meet the statutory definition of “employee” under the National Labor Relations Act, the unanimous Board stated “it would not effectuate the policies of the Act to assert jurisdiction” here. However, the Board expressly left open the possibility it would assert jurisdiction “in another case involving grant-in-aid scholarship players (or other types of scholarship athletes).”

The Board’s conclusion, it said, reflected the reality that colleges and universities playing intercollegiate athletics band together to enact and enforce common rules for recruiting, practicing and competition by means of the National Collegiate Athletic Association (NCAA) and conferences. “As a result,” the agency reasoned, “labor issues directly involving only an individual team and its players would also affect the NCAA, the Big Ten, and other member institutions. Many terms applied to one team therefore would likely have ramifications for other teams. Consequently, ‘it would be difficult to imagine any degree of stability in labor relations’ if we were to assert jurisdiction in this single-team case.”

The Board also recognized the difficulty resulting from the fact that 108 of the 125 colleges and universities playing in the NCAA Division 1 Football Bowl Subdivision (FBS) are state-run institutions. Therefore, “the Board cannot assert jurisdiction over the vast majority of FBS teams because they are not operated by ‘employers’ within the meaning of...the Act.” Indeed, in the Big Ten Conference, Northwestern is the only private institution.

These facts distinguished the *Northwestern* case from those involving professional sports leagues, the NLRB said, noting that “in all of our past cases involving professional sports, the Board was able to regulate all, or at least most, of the teams in the relevant league or association.”

The Board stressed the “novel and unique circumstances” of this matter. It had never before been asked to assert jurisdiction in a case involving college athletes or football players. Neither had a petition for representation for a single college team unit or a group of college teams ever been filed or considered by the Board previously. Rejecting a potential analogy to graduate student assistants or student janitorial workers and cafeteria workers, the Board ruled the Northwestern football players are students as well as athletes who receive a scholarship to participate in an extracurricular activity. Northwestern players were different from other determinations in prior Board decisions involving students. Whether these student-athletes were employees under the NLRA was hardly free from doubt.

Despite the broad underpinnings of its ruling, the Board did not foreclose applying different standards later. For example, the Board noted its decision did “not address what the Board’s approach might be to a petition for all FBS scholarship football players (*or at least those at private colleges and universities*).” (Emphasis added.) Thus, the Board’s explanation that it was declining jurisdiction because the union’s petition did not cover the entire FBS suggests it may be open to the possibility of countenancing a petition covering players at all private institutions in the FBS.

Union proponent and former Northwestern quarterback Kain Colter tried to justify his organizational attempts despite the Board’s decision. He stated, “We are obviously disappointed. Still the

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unionization effort has already helped players with additional stipends, guaranteed scholarship and protocols to protect players who suffer concussions.” This is paradoxical, since the Board strongly suggested that improving treatment of NCAA scholarship players played a part in its decision to decline jurisdiction.

The Board’s decision will make it difficult for CAPA or another labor organization to organize scholarship football players at FBS schools. Some leagues have few private institutions, if any. Even in leagues with many private institutions, those schools are still in the minority, and so “labor stability” would not offer a firm rationale for Board jurisdiction.

The Board may take jurisdiction in other sports, at least where private institutions predominate. Further, the Board’s decision does not mean it will not take jurisdiction for other purposes, such as to remedy unfair labor practices. It cautioned: “. . . we are unwilling to find that a labor dispute involving an FBS football team would not have a ‘sufficiently substantial’ effect on commerce to warrant declining to assert jurisdiction.”

The *Northwestern University* decision is limited by its terms, and may afford school athletic programs only passing protection. The current NLRB may yet seek to tackle college and university sports for organized labor.

The game is a long way from over.

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